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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

MARK J. GERAGOS and EUGENE  
PATTERSON HARRIS,

Plaintiffs and Respondents,

v.

JEFFREY BORER,

Defendant and Appellant.

B208827

(Los Angeles County  
Super. Ct. No. BC306668)

APPEAL from a judgment of the Superior Court of Los Angeles County, Soussan G. Bruguera, Judge. Reversed and remanded.

Law Offices of Lloyd Kirschbaum and Lloyd Kirschbaum for Defendant and Appellant.

Geragos & Geragos, Shelley Kaufman, Tina Glandian; Kabateck Brown Kellner, Brian S. Kabateck and Richard L. Kellner for Plaintiffs and Respondents.

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## **INTRODUCTION**

Defendant and appellant Jeffrey Borer surreptitiously and illegally videotaped the noted entertainer Michael Jackson and his two criminal defense lawyers, plaintiffs and respondents Mark Geragos and E. Pat Harris (plaintiffs), while Jackson and plaintiffs were flying in a chartered airplane. Borer planned to sell the videotape to a media company for a large sum of money. Before he could do so, however, plaintiffs filed suit against Borer and obtained an injunction prohibiting the sale of the videotape. Plaintiffs asserted causes of action for, inter alia, invasion of privacy and use of name and likeness in violation of Civil Code section 3344. After a bench trial, plaintiffs obtained a judgment against Borer for compensatory damages in the cumulative sum of \$2.25 million and for punitive damages in the cumulative sum of \$9 million.

Borer contends that there was insufficient evidence to support the amount of damages. We agree. The judgment shall be reversed and the matter remanded for a new trial on damages unless plaintiffs agree to a reduced award of compensatory damages in the cumulative amount of \$150,000 and a reduced award of punitive damages in the cumulative amount of \$600,000, in which event the judgment will be modified to award plaintiffs damages in those amounts, and as so modified shall be affirmed.

## **BACKGROUND**

### *1. The Videotape*

In November 2003, Geragos and Harris of the law firm of Geragos & Geragos, APC, represented Michael Jackson with respect to criminal charges brought by the Santa Barbara District Attorney. The Jackson case was a matter of intense international media coverage. In light of safety concerns, the Santa Barbara Sheriff's Department and Geragos negotiated a date, time, and place for Jackson's arrest. Geragos and Jackson's assistant arranged to charter an airplane from defendant XtraJet, Inc. (XtraJet) to fly Jackson, Geragos, Harris and Jackson's assistant from Las Vegas, Nevada to Santa

Barbara County so that Jackson could be arrested.<sup>1</sup> Geragos decided to charter a private airplane because he wanted a confidential setting in which he could communicate with Jackson.

On or about November 19, 2003, Borer, the owner of XtraJet, instructed Arvel Jett Reeves to install audio-video recording equipment on the airplane chartered by Jackson. Shortly afterwards, Reeves purchased two mini-camcorders, extension microphones, and remote lenses for the camcorders. Borer and Reeves intended to create audio and video recordings of Jackson and his attorneys, and then sell these recordings to the media for a large sum of money.

Reeves and another unidentified individual worked into the early morning hours of November 20, 2003, installing the camcorders on the airplane.<sup>2</sup> Reeves was unable to install remote microphones because he failed to purchase the proper connections.<sup>3</sup>

On November 21, 2003, Jackson, Geragos, Harris, and Jackson's assistant flew on an XtraJet airplane from Las Vegas to Santa Barbara County as planned. During that flight the passengers were secretly videotaped.

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<sup>1</sup> At that time Afta Incorporated was doing business as "XtraJet." It is unclear from the record whether XtraJet, Inc. was a separate company from Afta Incorporated.

<sup>2</sup> As explained below, Borer and Reeves were convicted of federal crimes related to this incident. The unidentified individual was referred to in Borer's and Reeves's plea agreements as an "unindicted coconspirator."

<sup>3</sup> The judgment prepared by plaintiffs' counsel and signed by the trial court states that defendants made a "video and audio recording" of the interior of the cabin of the airplane. However, there is no evidence in the record that the videotape had an audio component; the only evidence is that there was no audio component.

## 2. *Defendants Were Enjoined From Selling the Videotape*

The videotape first came to the attention of Geragos and Harris when Geragos received a call from Greta Van Susteren of Fox News regarding the matter. Geragos then called Lloyd Kirschbaum, Borer's and XtraJet's lawyer, and demanded that Kirschbaum turn over the videotape. Kirschbaum, however, denied that request. Instead, he advised Geragos something to the effect that his clients were going to "hit the lottery" or that it was their "pay day." Kirschbaum further stated that the videotape was worth "more than a million" or "millions" of dollars. Kirschbaum also told Geragos that he could place a "bid" on the videotape.

The existence of the videotape and speculation about its contents became a matter of public discussion on cable news programs and elsewhere. Geragos received approximately 50-100 calls from reporters regarding the videotape.

On November 25, 2003, Geragos and Harris commenced this action and sought a temporary restraining order (TRO) to enjoin the dissemination of the videotape. The court granted the TRO. At the TRO hearing, Kirschbaum argued on behalf of Borer that the plaintiffs should be required to post an undertaking. Kirschbaum claimed that assuming the videotape could be sold, "it may have an extremely high value." He further advised the court that media companies were willing to pay between \$10,000 and \$15,000 merely to take pictures of the empty airplane where the videotape was recorded, and upwards of \$20,000 to \$30,000 for an interview regarding the videotape. The court required plaintiffs to post a \$20,000 bond.

## 3. *Plaintiffs' First Amended Complaint*

Plaintiffs' operative pleading is the first amended complaint. The named plaintiffs are Jackson, Geragos, Harris, and Geragos & Geragos, APC. The named defendants are Borer, XtraJet, Pavair, Inc., a company affiliated with Borer, Cynthia Montgomery, a travel agent allegedly involved in the scheme to videotape Jackson and his lawyers, and Travel 21, Inc., a company affiliated with Montgomery. The first amended complaint sets forth causes of action for (1) invasion of privacy, (2) public disclosure of private facts, (3) common law misappropriation of name and likeness, (4) use of name and

likeness in violation of Civil Code section 3344, (5) violation of the constitutional right of privacy, (6) recording of confidential information (Penal Code §§ 632, 637.2), (7) unfair business practices (Bus. & Prof. Code, § 17200 et seq.), and (8) negligence.

4. *Borer's Conviction of a Federal Crime*

Borer's participation in the plan to videotape Jackson and his lawyers resulted in criminal charges against him in federal court. On March 6, 2006, in the United States District Court for the Central District of California, Borer pleaded guilty to one count of conspiracy to intercept an oral communication in violation of 18 U.S.C. § 2511(1)(b)(iv) and 18 U.S.C. § 371. Judge A. Howard Matz accepted Borer's plea and found Borer guilty of the charge.

5. *The Trial, Judgment and Motion for New Trial*

The superior court conducted a bench trial. Geragos and Harris were the only percipient witnesses called by plaintiffs. Professor Stanley Goldman also testified as an expert witness regarding media issues. In addition, plaintiffs played the videotaped deposition of Reeves and submitted the plea agreements of Borer and Reeves. Borer did not call any witnesses or present any evidence.

An important issue at trial was the value of the videotape. Geragos testified about his conversation with Kirshbaum and Kirshbaum's statement that the videotape was worth "more than a million or millions." He also testified that he received a call from reporter Greta Van Susteren "telling [Geragos] that somebody at Fox [News] had relayed to her that somebody was shopping [the videotape] around for \$1 million or \$2 million." Borer objected to this testimony as hearsay but the trial court overruled the objection.

Professor Goldman testified that Ms. Van Susteren "claimed to have direct sources that told her that it [the videotape] was being offered for \$1 million."<sup>4</sup> The court overruled Borer's hearsay objection to this testimony. Professor Goldman further testified that the videotape of Jackson, Geragos and Harris would be much more valuable

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<sup>4</sup> Professor Goldman also testified that "there were reports that the price [of the videotape] was quite high . . . in the hundreds of thousands of dollars."

if it had an audio component, though he could not quantify the value of the tape with or without an audio component. There was no evidence presented at trial that the videotape was actually sold or that defendants made any profit on the videotape.

There was also no evidence regarding the content of the videotape. The trial court admonished the parties and the witnesses against discussing the content of the videotape in open court in order to protect Michael Jackson's attorney-client privilege. For the same reason, the trial court declined to accept Borer's request to review the videotape in camera.

The trial court entered judgment in favor of plaintiffs on all eight causes of action. Defendants XtraJet, Borer and Montgomery were ordered to destroy the original and all copies of the videotape, and were permanently enjoined from the sale or further dissemination of the videotape.

The trial court awarded Geragos \$2 million in compensatory damages against XtraJet, Borer and Montgomery, \$8 million in punitive damages against Borer, and \$8 million in punitive damages against XtraJet. The court awarded Harris \$250,000 in compensatory damages against XtraJet, Borer, and Montgomery, \$1 million in punitive damages against Borer, and \$1 million in punitive damages against XtraJet.<sup>5</sup>

The trial court did not separately award compensatory or punitive damages in connection with particular causes of action. In its discussion of compensatory damages, the court noted that "the evidence submitted established that the recording was worth upwards of two million dollars (\$2,000,000.00) and was being shopped around for more than that amount."

After the judgment was entered Borer moved for a new trial, which the trial court denied. This appeal followed.

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<sup>5</sup> Plaintiff Michael Jackson dismissed his claims before the trial. The judgment did not adjudicate the claims asserted by plaintiff Geragos & Geragos, APC or the claims against defendants Pavair, Inc. and Travel 21, Inc. It appears that these parties were no longer part of the litigation when the judgment was entered. Defendants XtraJet and Montgomery did not appeal the judgment.

## CONTENTIONS

Borer's principal argument is that there was insufficient evidence to support the trial court's awards of compensatory and punitive damages. He contends that plaintiffs were only entitled to nominal compensatory damages and no punitive damages. He also contends that the award of punitive damages violates his due process rights under the Fourteenth Amendment to the United States Constitution.

Borer further contends that the trial court made a series of errors that resulted in excessive damages. Specifically, he contends that the trial court erred by refusing to view the videotape in camera, by admitting hearsay statements about the value of the videotape, by finding that there was an audio component to the videotape, and by failing to differentiate between the high commercial value of Jackson's image and the limited commercial value of Geragos's and Harris's images.

In addition, Borer argues that there was no substantial evidence supporting the trial court's ruling on liability with respect to plaintiffs' third cause of action for common law misappropriation of name and likeness and fourth cause of action for use of name and likeness in violation of Civil Code section 3344.

Finally, Borer argues that the trial court's denial of his motion for a new trial was error because the compensatory and punitive damages awarded were not supported by substantial evidence. "An order denying a motion for new trial is nonappealable. [Citation.] Such an order, however, may be reviewed on appeal from the underlying judgment." (*Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 18.)

## DISCUSSION

### 1. *Standards of Review*

Most of Borer's arguments relate to alleged errors in the trial court's factual findings. We review a trial court's factual findings under the substantial evidence standard of review. (*Spencer v. Marshall* (2008) 168 Cal.App.4th 783, 792.) " " " "When a finding of fact is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether

there is any substantial evidence, contradicted or uncontradicted, which will support the finding of fact. [Citations.] [¶] When two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court.” ’ ’ (Id. at pp. 792-793.)

Where, as here, an appellant is challenging a trier of fact’s determination of damages, our review is severely circumscribed. (*Johnson v. Stanhiser* (1999) 72 Cal.App.4th 357, 361. “ ‘An appellate court may interfere with that determination only where the sum awarded is so disproportionate to the evidence as to suggest that the verdict was the result of passion, prejudice or corruption [citations] or where the award is so out of proportion to the evidence that it shocks the conscience of the appellate court.” (*Ibid.*) Further, “the trial court’s judgment is presumptively correct, such that error must be affirmatively demonstrated, and where the record is silent the reviewing court will indulge all reasonable inferences in support of the judgment.” (*Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 556-557 (*Yield*).)

We review Borer’s challenge to the sufficiency of the evidence supporting the trial court’s punitive damages award under the substantial evidence standard. (*County of San Bernardino v. Walsh* (2007) 158 Cal.App.4th 533, 545.) Borer’s constitutional challenge to the punitive damages award is subject to de novo review. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1172.)

Even assuming we find that the trial court erred, we cannot reverse the judgment unless it appears “ ‘reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.’ [Citations.] This means the appellant must show not only that error occurred but that it is likely to have affected the outcome.” (*Yield, supra*, 154 Cal.App.4th at p. 557.)

2      *There Was No Substantial Evidence Supporting the Judgment With Respect to Plaintiffs' Causes of Action for Common Law Misappropriation of Name or Likeness and Use of Name and Likeness in Violation of Civil Code Section 3344*

“In California the right of publicity is both a common law right and a statutory right. [Citation.] The common law right of publicity has been recognized in this state since 1931. [Citations.] In 1971, the Legislature enacted [Civil Code] section 3344, which authorized recovery of damages by any living person whose name, photograph, or likeness was used for commercial purposes without his or her consent.” (*Gionfriddo v. Major League Baseball* (2001) 94 Cal.App.4th 400, 408.) Plaintiffs have asserted both rights here.

Plaintiffs' third cause of action is for misappropriation of name and likeness. The elements of this tort, at common law, are: “(1) the defendant's use of the plaintiff's identity; (2) *the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise*; (3) lack of consent; and (4) resulting injury. [Citations.]” (*Eastwood v. Superior Court* (1983) 149 Cal.App.3d 409, 417 (*Eastwood*), italics added.)

Plaintiff's fourth cause of action is for use of name and likeness in violation of Civil Code section 3344. Civil Code section 3344, subdivision (a) provides, in part: “Any person who knowingly *uses* another's name, voice, signature, photograph, or likeness, in any manner, *on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services*, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof.”<sup>6</sup> (Italics added.)

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<sup>6</sup> “For purposes of this section, a use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required under subdivision (a).” (Civ. Code, § 3344, subd. (d).)

Relying mainly on *Eastwood* and *Solano v. Playgirl, Inc.* (9th Cir. 2002) 292 F.3d 1078 (*Solano*), plaintiffs argue that defendants tortuously “used” their names and likeness. In *Eastwood*, the defendant publisher made a “telecast advertisement” in which it featured the plaintiff’s name and photograph and mentioned prominently an article regarding the plaintiff in the defendant’s newspaper. (*Eastwood, supra*, 149 Cal.App.3d at p. 415.) The defendant thus clearly used the plaintiff’s name and photograph to sell newspapers.

Similarly, in *Solano*, the defendant published a photograph of the plaintiff and the plaintiff’s name on the cover of its magazine without the plaintiff’s consent. There was evidence that the defendant used the plaintiff’s name and likeness in a knowingly false manner in order to promote the magazine’s sales. (*Solano, supra*, 292 F.3d at pp. 1086, 1089.)

The present case is distinguishable from *Eastwood* and *Solano*. Plaintiffs base their common law and statutory causes of action on defendants’ alleged use of their likeness as depicted in the videotape.<sup>7</sup> There was no evidence, however, that Borer used the videotape or plaintiffs’ likeness for commercial purposes, i.e., on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services. Defendants did not sell the videotape or make profits from the videotape or use it to their advantage in any manner. Accordingly, there was insufficient evidence supporting plaintiffs’ third and fourth causes of action, and the trial court’s ruling in plaintiffs’ favor on those causes of action was error.

### 3. *Plaintiffs’ Compensatory Damages Were Excessive as a Matter of Law*

Our determination that the trial court erred with respect to plaintiffs’ third and fourth causes of action is not, by itself, reason to reverse the judgment. An appellant has the burden to show not only that the trial court erred but also that the error is prejudicial. (Cal. Const., art. VI, § 13; Code Civ. Proc., § 475; *Pool v. City of Oakland* (1986)

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<sup>7</sup> Civil Code section 3344, subsection (b) defines the term “photograph” to include a videotape.

42 Cal.3d 1051, 1069.) An error is not prejudicial if independent grounds unaffected by the error support the judgment. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19; *Estate of Beard* (1999) 71 Cal.App.4th 753, 776-777.) Accordingly, if we find substantial evidence to support the judgment based on plaintiffs' remaining six causes of action, we must affirm. (*Leoni v. Delany* (1948) 83 Cal.App.2d 303, 309; *Berger v. Southern Pac. Co.* (1956) 144 Cal.App.2d 1, 6; *Bresnahan v. Chrysler Corp.* (1998) 65 Cal.App.4th 1149, 1153-1154.)

Plaintiffs were entitled to recover tort damages they sustained in connection with five of their remaining six causes of action.<sup>8</sup> Except as expressly provided by the Civil Code, the measure of tort damages "is the amount which will compensate for all the detriment proximately caused [by the tortious conduct], whether it could have been anticipated or not." (Civ. Code, § 3333). In cases involving an invasion of privacy, this amount includes out-of-pocket loss and the " 'impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.' " (*Diaz v. Oakland Tribune, Inc.* (1983) 139 Cal.App.3d 118, 137; accord *Fairfield v. American Photocopy etc. Co.* (1955) 138 Cal.App.2d 82, 88-90.)<sup>9</sup>

Borer argues that plaintiffs only submitted evidence of nominal damages. We reject that argument. Geragos presented his own testimony to prove his damages. He testified as follows. The incident was "embarrassing," "extremely upsetting" and "enormously offensive" to Geragos. Geragos did not, however, receive any treatment or counseling for his injuries.

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<sup>8</sup> Plaintiffs' seventh cause of action for unfair competition is equitable in nature; damages cannot be recovered. (*In re Tabacco II Cases* (2009) 46 Cal.4th 298, 312.)

<sup>9</sup> Penal Code section 637.2, subdivision (a) provides that any person injured as a result of the recording of a confidential communication in violation of Civil Code section 632, may recover the greater of \$5,000 or three times the amount of actual damages, if any, he or she sustained. The trial court did not separately award a specific sum of damages for defendants' violation of Penal Code section 632, nor did it treble such damages pursuant to Penal Code section 637.2.

The incident also affected Geragos's law practice. Part of Geragos's practice involved representing high profile people. Indeed, after November 2003, Geragos always had at least one client who was subject to media attention. Accordingly, in response to Borer's misconduct, Geragos went to "almost paranoid lengths" to safeguard his communications with his clients. He met clients in hotel rooms, hotel conference rooms, under freeways and under bridges. He hired a private investigator to work full-time for his firm. One of the reasons he relocated his office was so that he could maintain better security.

Harris too testified regarding plaintiffs' damages. He testified as follows. The incident was "very embarrassing" and made Harris and Geragos "look less than professional." Harris "felt like it [the videotape] damaged [plaintiffs'] reputation a great deal." Further, the incident created an "air of paranoia" within plaintiffs' law firm. Harris often conducted face-to-face meetings with clients because he was afraid of being taped. On one occasion, Harris flew to "Moldovia" [*sic*] to meet an attorney in order to engage in a secure conversation. Finally, Harris was upset about the incident because it offended his sense of ethics.

This testimony constitutes substantial evidence that both Geragos and Harris sustained damages beyond a nominal amount. Plaintiffs had good reason to be very upset about Borer's outrageous and illegal conduct. However, for reasons we shall explain, the amount of compensatory damages awarded went far beyond any reasonable amount in light of the evidence presented. The amount awarded to the plaintiffs was so great that it shocks the conscience.

The most serious gap in plaintiffs' evidence is that there was virtually no evidence that anyone actually viewed the videotape. Plaintiffs' expert, Stanley Goldman, testified that he saw a "small excerpt" of the videotape as part of his work at Fox News. There was also evidence that Borer solicited bids for the videotape from the media. Thus, if the evidence is viewed in a light most favorable to plaintiffs, plaintiffs proved at most that a handful of people within the media viewed the videotape but the videotape was never

seen by the public at large.<sup>10</sup> Further, because the videotape did not contain an audio component and because there was no evidence about the content of the videotape, there was no evidence that any third party ascertained any statements made by Geragos, Harris and Jackson to each other during their flight from Las Vegas to Santa Barbara.<sup>11</sup>

In addition, Harris's conclusionary statement that he "felt" the videotape damaged plaintiffs' reputation was not supported by any other evidence. Plaintiffs did not present any evidence that they lost a single client as a result of the videotape or that any clients or potential clients expressed concern about plaintiffs' professionalism. There was also no evidence anyone perceived that plaintiffs acted in a less than competent and professional manner in connection with the recording of the videotape. Indeed, it is difficult to find fault with plaintiffs' conduct because plaintiffs were the victims of a crime and had no reason to believe that they could not speak in confidence with their client in a privately chartered airplane. Accordingly, there was no objective reason to conclude that plaintiffs' reputation was greatly harmed by the unlawful recording of a silent videotape that almost no one saw.

With respect to plaintiffs' increased security measures in the wake of the videotape, we find that, as a matter of law, Borer's tortious conduct was not the proximate cause of alleged damages arising from some of the more extreme actions taken by plaintiffs. For example, there is at most a tenuous connection between the recording of the videotape and plaintiffs' decision to have Harris fly overseas to meet an attorney. Although Borer's conduct was reprehensible, Borer was not liable for the costs of any

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<sup>10</sup> At the November 25, 2003, TRO hearing, Borer's attorney stated that he had viewed the videotape. However, this statement was not made under oath and thus was not evidence the trial court could consider. (Evid. Code, § 710.)

<sup>11</sup> Professor Goldman testified that if news organizations were able to broadcast the videotape, they would have hired a lip reader to decipher the contents of the communications between Michael Jackson and plaintiffs. However, we cannot speculate whether any media organization actually hired a lip reader and, if so, whether the lip reader was successful.

and all security measures plaintiffs took after the incident regardless of whether such measures were reasonable and necessary.

Moreover, plaintiffs did not present any evidence of the amount of the costs of their increased security measures. The record does not even indicate whether the costs of additional security measures were incurred by the law firm Geragos & Geragos, APC or by Geragos and Harris individually. Accordingly, there was no evidence that such costs constitute out-of-pocket expenses Geragos and Harris can recover.

Plaintiffs' reliance on *Sommer v. Gabor* (1995) 40 Cal.App.4th 1455 (*Sommer*) is misplaced. There, one of the defendants, Zsa Zsa Gabor, was quoted in an article published in a German magazine with a circulation of 1.3 million as stating that the plaintiff, actress Elke Sommer, "is broke, had to sell her house in Hollywood, now lives in the worst section, hangs out in sleazy bars, lives from selling her handknit sweaters for \$150, and nobody wants to have anything to do with her anymore." (*Id.* at p. 1461.) The other defendant, Frederic Von Anhalt, was quoted in that same article as stating that Sommer " 'was completely ruined' " and " 'hardly had any hair on her head.' " (*Ibid.*) Von Anhalt also was quoted in a German newspaper with a circulation of 3.9 million as stating that Sommer "could not buy a \$500 ticket for a charity benefit, Sommer's bills were not being paid, in Hollywood no one recognizes her on the street anymore, Sommer was lying about her age in that she was not 48 but 62, and that Sommer looks like a 100-year-old grandmother." (*Id.* at p. 1462.)

After the publication of the articles, Sommer received about 200 fan letters, some offering to help her. (*Sommer, supra*, 40 Cal.App.4th at p. 1463.) As a result of the articles, Sommer "suffered sleeplessness, headaches, and was sick to her stomach; she saw a psychiatrist twice." (*Id.* at p. 1462.)

Claiming that the defendants' statements about her were false, Sommer sued the defendants for defamation. At the trial, Sommer's publicist testified that Sommer was " 'an actress who has always had a highly sexual identification. She's certainly a glamour star, and one tends to be regarded less glamorously as you get older.' " (*Sommer, supra*, 40 Cal.App.4th at p. 1463.) Sommer's publicist also testified that the

articles damaged Sommer's reputation as an actress and were " 'terminal to her career.' " (*Id.* at p. 1471.)

The jury awarded Sommer \$800,000 in compensatory damages and \$450,000 in punitive damages against Gabor and \$1.2 million in compensatory damages and \$850,000 of punitive damages against Von Anhalt. The Court of Appeal affirmed the judgment, holding that the amount of damages awarded was not excessive. (*Sommer*, *supra*, 40 Cal.App.4th at pp. 1463-1464.)

The present case is distinguishable from *Sommer*. The defamatory statements in *Sommer* were published in periodicals that were distributed to millions of people. Here, by contrast, almost no one viewed the silent videotape of plaintiffs and Michael Jackson.

Moreover, in light of the nature of the defamatory statements, their relevance to Sommer's career as an actress, the publicist's opinion, the widespread circulation of the articles, and Sommer's fan letters, a finding that Sommer's professional reputation was greatly harmed was supported by substantial evidence. Here, as we have explained, the only evidence that plaintiffs' reputation was harmed was Harris's conclusionary statement that he "felt" that plaintiffs' reputation was "greatly damaged" as a result of the recording of the silent videotape that was not seen by the public.

Finally, Sommer suffered physical symptoms associated with her mental suffering and received psychiatric treatment. Conversely, there was no evidence in this case that Geragos and Harris sustained physical injuries or similarly severe psychic injuries. For all of these reasons, *Sommer* does not support the award of damages in this case.

We conclude that plaintiffs' compensatory damages were excessive as a matter of law. Having reached that conclusion, this court may "(1) remand for a new trial on all issues [citation] or on the issue of damages alone [citation], or (2) issue a remittitur conditioning affirmance of the judgment on plaintiff's agreement to remit part of the award [citations.]" (*Cunningham v. Simpson* (1969) 1 Cal.3d 301, 310.) We shall give plaintiffs Geragos and Harris a choice of whether to pursue a new trial on damages or whether to accept reduced compensatory damages in the amount of \$100,000 for Geragos

and \$50,000 for Harris. As we shall explain below, plaintiff may only elect the second option if they also elect to reduce their punitive damages award.

4. *Plaintiffs' Punitive Damages Award Violates the Due Process Clause*

“The due process clause of the Fourteenth Amendment prohibits grossly excessive or arbitrary punishment of a tortfeasor and therefore limits the amount of punitive damages that a state court can award.” (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 689 (*Bullock*)). We consider three guideposts in determining whether punitive damages pass constitutional muster: “(1) the degree of reprehensibility of the defendant’s misconduct, (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages awarded by the jury” and comparable civil penalties where available. (*State Farm Mut. Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408, 418 (*State Farm*)); accord *Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191, 1201.)

Applying the three due process guideposts, we reject Borer’s argument that no punitive damages can be awarded. However, we also hold that the punitive damages award was excessive as a matter of law because it violates Borer’s due process rights.<sup>12</sup>

A. *The Degree of Reprehensibility*

The most important indicator of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct. (*State Farm, supra*, 538 U.S. at p. 419.) “Courts utilize five factors to help determine the degree of reprehensibility of a defendant’s conduct: (1) whether the harm was physical and not merely economic; (2) whether the conduct demonstrated an indifference or reckless disregard for the health or safety of others; (3) whether the target of the conduct was financially vulnerable;

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<sup>12</sup> “Under California law, a punitive damages award must be based on three factors: (1) the reprehensibility of the defendant’s conduct; (2) the amount of compensatory damages awarded to or actual harm suffered by the plaintiff; and (3) the defendant’s financial condition.” (*Bullock, supra*, 159 Cal.App.4th at p. 690, fn. 18.) Borer contends that there was no substantial evidence to support the trial court’s award of punitive damages under California law. We do not reach this issue because we hold that the punitive damages award violates the due process clause.

(4) whether the conduct was repeated or an isolated incident; and (5) whether the conduct was the result of intentional acts or mere accident.” (*Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1223, citing *State Farm*, at p. 419.)

“The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect. It would be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant’s culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence. [Citation.]” (*State Farm, supra*, 538 U.S. at p. 419.)

In this case, Borer’s misconduct was sufficiently reprehensible to warrant punitive damages. There was abundant evidence that Borer acted with malice, that is, he engaged in despicable conduct with a willful and conscious disregard of the rights of others. (Civ. Code, § 3294, subd. (c)(1).) The right violated here was the right of plaintiffs to engage in confidential communications without a third party unlawfully recording such communications. (See Pen. Code, § 630.)

What makes matters worse is that Borer tried to record the confidential communications between criminal defense lawyers and their client.<sup>13</sup> “ ‘While it is perhaps somewhat of a hyperbole to refer to the attorney-client privilege as “sacred,” it is clearly one which our judicial system has carefully safeguarded with only a few specific exceptions.’ ” (*Solin v. O’Melveny & Myers* (2001) 89 Cal.App.4th 451, 457, fn. omitted.)

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<sup>13</sup> We recognize that the holder of the attorney-client privilege is the client, and not the attorney. (Evid. Code, §§ 953, 954.) We also acknowledge that “a state court may not award punitive damages for the purpose of punishing a defendant for harm caused to nonparties to the litigation.” (*Bullock, supra*, 159 Cal.App.4th at pp. 691-692.) Thus Geragos and Harris cannot recover punitive damages against Borer for harm caused to Jackson, who was not a party to the litigation at the time of the trial.

Borer not only sought to violate the attorney-client privilege, he did so in order to make a profit. Professor Goldman testified that “as soon as it becomes profitable to start to invade the attorney-client privilege, then much more of that will happen. It would find a market.” It therefore was appropriate for the trial court to award exemplary damages to deter Borer and others from violating the attorney-client privilege for the purpose of making a profit.

Most of the reprehensibility factors, however, weigh against a high punitive damages award. Borer’s conduct did not endanger the health or safety of others and did not cause any physical harm, though plaintiffs were embarrassed and upset. The target of Borer’s conduct--Michael Jackson and his lawyers— were not financially vulnerable. Rather, Jackson was sufficiently wealthy to charter a private airplane and his lawyers were sophisticated and presumably well-compensated professionals. Further, there was no evidence of repeated misconduct by Borer; this appears to be an isolated incident. Under the totality of the circumstances, the reprehensibility of Borer’s conduct was not particularly egregious compared to other conduct that justifies punitive damages.

B. *The Ratio of Punitive Damages to Harm*

Although the United States Supreme Court has rejected the use of “a simple mathematical formula” (*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 582), the high court has held that “few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.” (*State Farm, supra*, 538 U.S. at p. 425.) “The court also explained that past decisions and statutory penalties approving ratios of 3 or 4 to 1 were ‘instructive’ as to the due process norm, and that while relatively high ratios could be justified when ‘ “a particularly egregious act has resulted in only a small amount of economic damages” [citation] . . . [t]he converse is also true . . . . When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.’ ” (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1182, citing *State Farm*, at p. 425.)

In present case, as we have explained, the evidence adduced at trial cannot support compensatory damages greater than \$100,000 for Geragos and \$50,000 for Harris. In light of the reprehensibility of Borer's conduct, punitive damages greater than a four-to-one ratio cannot be justified. Because the punitive damages awarded Geragos and Harris exceeds that ratio, Borer's due process rights were violated.

C. *Civil Penalties for Comparable Conduct*

The parties have not referred us to any civil penalties for comparable conduct. We thus do not consider this guidepost in our due process analysis.

5. *Borer's Remaining Arguments*

Borer argues that there was no evidence supporting the trial court's finding that there was an audio component to the videotape. He further argues that the trial court erred in refusing to view the videotape in camera because such a review would have shown that there was no audio component. We have, however, assumed in our analysis that there was no sound on the videotape. Thus the trial court's erroneous finding that there was an audio recording did not result in a miscarriage of justice and does not, by itself, require a reversal of the judgment.

Borer argues that the trial court abused its discretion by overruling his hearsay objections to evidence regarding the value of the videotape. He further argues that the trial court overvalued the videotape because it failed to differentiate between the high commercial value of Michael Jackson's image and the limited commercial value of Geragos's and Harris's images. Both of these arguments relate to plaintiffs' common law and statutory causes of action for use of name and likeness. We need not address these arguments because we have ruled in Borer's favor with respect to those causes of action on different grounds.

## **DISPOSITION**

The judgment is reversed and the matter is remanded for a new trial on damages arising from plaintiffs' first, second, fifth, sixth and eighth causes of action. However, if Geragos shall, within 30 days from the date of our remittitur, file pursuant to California Rules of Court, rule 8.264(d) a written consent to a reduction of the compensatory damages award against Borer to \$100,000, and a reduction of the punitive damages award against Borer to \$400,000, the judgment will be modified to award Geragos damages in those amounts, and as so modified will be affirmed in its entirety with respect to Geragos. (*Rosener v. Sears Roebuck & Co.* (1980) 110 Cal.App.3d 740, 757.) Likewise, if Harris shall, within 30 days from the date of our remittitur, file pursuant to California Rules of Court, rule 8.264(d) a written consent to a reduction of the compensatory damages award against Borer to \$50,000, and a reduction of the punitive damages award against Borer to \$200,000, the judgment will be modified to award Harris damages in those amounts, and as so modified will be affirmed in its entirety with respect to Harris. (*Ibid.*) The decisions of Geragos and Harris shall be independent and shall not be binding on the other plaintiff with respect to accepting a reduced award of compensatory and punitive damages or, alternatively, pursuing a new trial on damages. The parties shall bear their own costs on appeal.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

KITCHING, J.

We concur:

CROSKEY, Acting P. J.

ALDRICH, J.